# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| JOEL C. McCORMICK,<br><br>Respondent,<br><br>v.<br><br>DUNN & BLACK, P.S.,<br><br>Appellants. | No. 39236-4-II<br><br>UNPUBLISHED OPINION |

Armstrong, J. — Joel McCormick sued his former law firm, Dunn & Black, P.S. (the corporation), and former partners, Robert Dunn and John Black, for the value of his interest in the firm.[1] The defendants contended that McCormick's employment agreement limited his equity in the firm to a return of his $5,000 initial contribution. The trial court granted McCormick summary judgment, ruling that (1) the employment agreement had no effect with regard to McCormick's right to compensation for his shareholder interest in the firm and (2) McCormick's ineligibility as a shareholder under chapter 18.100 RCW entitled him to a stock redemption. The corporation challenges these rulings and the trial court's failure to consider Black's declaration as extrinsic evidence of the parties' intent to limit a departing partner's equity interest in the firm. Because the corporation has raised issues of material fact as to what the parties intended by the disputed provision in the employment agreement, we reverse and remand for trial. Additionally, we vacate the trial court's ruling on the applicability of the Professional Services Act, chapter 18.100 RCW.

[1] On the same day as the summary judgment hearing, Dunn and Black, in their individual capacities, were dismissed from the lawsuit.

FACTS

In 1992, Joel McCormick, John Black, and Robert Dunn incorporated the law firm of McCormick, Dunn & Black, P.S.[2] *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 878, 167 P.3d 610 (2007), *review denied*, 163 Wn.2d 1042 (2008) ("*McCormick I*"). After each partner contributed $5,000 in capital, each received an equal number of shares. *McCormick I*, 140 Wn. App. at 878.

McCormick drafted an employment agreement that both Dunn and Black signed. *McCormick I*, 140 Wn. App. at 879. Although McCormick signed as a witness to both Dunn and Black's employment agreements, he initially claimed he did not remember signing the agreement himself.[3] *McCormick I*, 140 Wn. App. at 879. Section 18 of the employment agreement states:

> This agreement may be terminated by either party upon thirty days written notice to the other. Termination by the corporation requires a two-thirds vote of corporate shareholders. The terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm, said amount being payable over a three year period in equal monthly installments. The terminating attorney shall not be entitled to any other amounts, unless agreed to by the remaining principals.

Clerk's Papers (CP) at 149. According to Dunn and Black, McCormick also drafted the articles of incorporation and the bylaws. *McCormick I*, 140 Wn. App. at 879. While these documents

[2] These parties are before this court a second time. Thus, many of the relevant facts have been previously litigated. *See McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007), *review denied*, 163 Wn.2d 1042 (2008).

[3] In *McCormick I*, McCormick maintained he did not remember signing the agreement. *McCormick I*, 140 Wn. App. at 879. Dunn claims, however, that McCormick did in fact sign the employment agreement. *McCormick I*, 140 Wn. App. at 879. McCormick's current position is that the employment agreement ceased to have legal effect after his termination and cannot be applied against him. Because we must construe the evidence in favor of the corporation as the nonmoving party, we assume that McCormick also signed the agreement.

contemplated a separate stock redemption agreement, none was ever made. *McCormick I*, 140 Wn. App. at 892.

Dunn and Black terminated McCormick as a firm employee in October 2002. *McCormick I*, 140 Wn. App. at 879. McCormick sued the corporation and Dunn and Black individually, seeking to recover the fair value of his one-third ownership interest in the firm.[4] *See McCormick I*, 140 Wn. App. at 890. The trial court granted summary judgment in favor of the corporation. We affirmed, holding that McCormick was not entitled to a share buyout because no stock redemption agreement was ever executed and courts do not have the power to make such an agreement where the parties have failed to do so. *McCormick I*, 140 Wn. App. at 892. We also held that the Professional Services Corporation Act, chapter 18.100 RCW, does not provide for stock redemption upon employment termination. *McCormick I*, 140 Wn. App. at 892. Notably, we declined to decide whether the employment agreement precluded a buyout of McCormick's shares. *McCormick I*, 140 Wn. App. at 896.

In August 2008, McCormick retired from the practice of law and resigned his Washington State Bar Association membership. Upon resigning, McCormick became ineligible to own shares in the corporation. *See* RCW 18.100.100. McCormick notified Dunn and Black of his resignation and demanded fair value of his equity in the firm. Dunn and Black responded that his financial interest in the firm was limited to what was provided in the employment agreement's termination clause. In September 2008, Dunn and Black tendered $5,000 to McCormick to

[4] McCormick also alleged claims for (1) dissolution of partnership, (2) breach of fiduciary duty, (3) dissolution of corporation, (4) violation of the Employee Retirement Income Security Act (ERISA), and (5) wrongful deprivation of wages. *McCormick I*, 140 Wn. App. at 881.

comply with the employment agreement.[5] McCormick rejected this tender.

McCormick then sued, seeking a declaration that the employment agreement did not define or limit his shareholder interest in the firm. The corporation counterclaimed for a declaration that McCormick was entitled to a share buyout of only $5,000, as provided in the employment agreement. Both parties moved for summary judgment. Additionally, McCormick moved for summary judgment on the issue of whether the Act provides him with a statutory right to payment for his shares. The trial court granted McCormick summary judgment, declaring as a matter of law that (1) the "Employment Agreement has no current force or effect with regard to [McCormick's] shareholder interest . . . and cannot now be applied to define or limit such interest" and (2) McCormick's "shares have not been transferred or extinguished, and the [Act] . . . applies to govern the rights and obligations of the parties with regard to the shares currently held by [McCormick]." CP at 300-03; 314-16.

## ANALYSIS

### I. Standard of Review

We review summary judgment orders de novo, considering all facts and reasonable inferences from them in favor of the nonmoving party. *Hisle v. Todd Pac. Shipyard Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *City of Lakewood, v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where the issues turn

[5] Arguably, the corporation repaid all three shareholders their $5,000 capital contribution in 1994. *McCormick I*, 140 Wn. App. at 878. The payment took form as a "bonus check." *McCormick*, 140 Wn. App. at 878. In *McCormick I*, we concluded that although the record was unclear as to whether the money was repayment for the initial contribution, the payment did not redeem any outstanding shares. *McCormick I*, 140 Wn. App. at 885-86.

on contract interpretation, summary judgment is not proper if the parties' written contract has two or more reasonable but competing meanings. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003).

II. Judicial Estoppel

McCormick contends that judicial estoppel bars the corporation from arguing the employment agreement precludes his right to a buyout. According to McCormick, this position is inconsistent with Dunn's and Black's previous position in *McCormick I* that no stock redemption agreement existed.

Judicial estoppel is an equitable rule that prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another proceeding. *Arkison v. Ethan Allen, Inc*., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Three factors guide the court's determination whether to apply the doctrine: (1) whether a party's later position is clearly inconsistent; (2) whether accepting an inconsistent position creates a perception that either the first or the second court was misled; and (3) whether the party asserting an inconsistent position would gain an unfair advantage or impose an unfair detriment on the opposing party. *Arkison*, 160 Wn.2d at 538-39. We review a trial court's decision to apply the equitable doctrine of judicial estoppel for an abuse of discretion. *Arkison*, 160 Wn.2d at 538. A trial court abuses its discretion when it exercises it in an untenable or manifestly unreasonable way. *State v. Rupe*, 108 Wn.2d 734, 753, 743 P.2d 210 (1987).

Here, the trial court ruled,

> I agree with the position of the plaintiff here that [the effect of the employment agreement with respect to McCormick's ownership interest] was specifically an issue that was . . . taken by the defense in the previous litigation. And I do feel

> that it is the proper subject of judicial – the doctrine of judicial estoppel, and will hold accordingly.

Report of Proceedings (RP) at 62.

The corporation's current position is not inconsistent with its prior position. In *McCormick I*, the corporation and Dunn and Black argued the parties did not start the firm with the intent to create a stock buyout and that McCormick could not have reasonably expected that he would be entitled to a buyout because of the employment agreement terms. *McCormick I*, 140 Wn. App. at 890. This is entirely consistent with the corporation's contention now. Our holding that no formal stock redemption agreement existed, despite being contemplated in the articles and bylaws, does not render its positions inconsistent. Moreover, in *McCormick I*, we treated the issues of whether a stock redemption agreement existed and whether the employment agreement precluded a buyout as separate and distinct. *McCormick I*, 140 Wn. App. at 896 (because McCormick did not have a claim where he was entitled to a buyout of his shares, whether the employment agreement precluded a buyout was deemed moot). Because the corporation has not taken a clearly inconsistent position from *McCormick I*, the trial court abused its discretion in applying this doctrine.

## III. The Employment Agreement

The corporation contends the trial court erred in ruling the employment agreement has no effect on McCormick's shareholder interest. It claims the founding partners specifically intended not to extend buyout rights to any shareholder who left the firm. The corporation urges us to consider Black's declaration describing the parties' intention not to create buyout rights when founding the firm. In its view, section 18 of the employment agreement reflects this intention.

McCormick counters that the employment agreement ceased to have legal force or effect after his termination and cannot be applied against him. According to McCormick, the employment agreement had nothing to do with a shareholder's ownership interest, and to preclude a buyout would amount to creating a share redemption contract the parties had not agreed to.

A. Current Effect of Employment Agreement

McCormick cites to three cases for his proposition that a party to a contract with no specific duration is no longer bound by its provisions when the other party terminates it. *Warren v. Stoddart*, 105 U.S. 224, 229, 26 L. Ed. 1117 (1881); *Walters v. Ctr. Elec., Inc.*, 8 Wn. App. 322, 335, 506 P.2d 883 (1973); *Cascade Auto Glass v. Progressive Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). McCormick misapplies these cases. The proposition in *Stoddart*—that a contract is no longer in force after one party terminates it—was derived from a contract governing indefinite reciprocal obligations.[6] *Stoddart*, 105 U.S. at 230. In *Walters*, the parties' contractual rights expired because a prerequisite to the continuation of the agreement ceased to exist. *Walters*, 8 Wn. App. at 335. And in *Progressive*, no rights existed under the original contract where it had been terminated and unilaterally replaced. *Progressive*, 135 Wn. App. at 771. None of these factual scenarios is analogous to the circumstances here.

Section 18 does not establish indefinite reciprocal obligations; instead, it creates guidelines for the termination of an employment relationship. Whatever the exact scope of the obligations

[6] A traditional bilateral contract is formed by the exchange of reciprocal promises. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 74, 199 P.3d 991 (2008). Thus, a bilateral contract with no specific duration establishes ongoing duties and obligations, terminable by failure to perform. *See Stoddart*, 105 U.S. at 229 (the contract was indefinite as to the time it was to continue in force and it contained reciprocal clauses, i.e., the rights and duties of the parties; thus, the breach occurred when one party failed to perform).

and rights contained in this section, they are triggered, not extinguished, by an employee's termination. As such, McCormick's termination triggered his right to the return of his capital contribution. Section 18 further places a limit on the amount of money that McCormick was entitled to upon termination. If the employment agreement was intended to preclude a buyout, this limit applied to McCormick's right to payment upon termination.[7]

The trial court reasoned the employment agreement dealt only with McCormick's employment status, not with any redemption rights or "any type of rights or definitions of what occurs with respect to the shareholder interest of Mr. McCormick when he left the corporation." RP at 61. But this assumes the parties intended section 18 to apply only to McCormick's rights as an employee, not as a shareholder. And that, as we discuss below, is a disputed issue of material fact.

B. Ambiguity of Terms

Contract interpretation is generally a determination of fact; "it is the process that ascertains the meaning of a term by examining objective manifestations of the parties' intent." *Denny's Rests., Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 201, 859 P.2d 619 (1993). Interpreting a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *see also Mayer v. Pierce County Med. Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (interpretation of an unambiguous contract is a matter of law). A contract

[7] If section 18 was not intended to preclude a buyout, the legal force or current effect of the employment agreement is moot.

provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Mayer*, 80 Wn. App. at 421.

Here, there are several unavoidable ambiguities in section 18 of the employment contract. Again, the agreement provides that "[t]he terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm. . .[t]he terminating attorney *shall not be entitled to any other amounts*, unless agreed to by the remaining principals." CP at 149 (emphasis added). The key phrase "any other amounts" can reasonably be understood as precluding an attorney from receiving the value of his shares after his termination. But it can also be interpreted as referring to all forms of compensation without pertaining to the redemption of stock, distinguishable on the grounds that an equity interest is an asset the shareholder owned. That the contested language is in an employment agreement further clouds the issue of what the parties intended.

Relevant extrinsic evidence also demonstrates the existence of competing meanings with respect to section 18. Under Washington's "context rule," extrinsic evidence may be admissible to give meaning to the contract language. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). Although evidence of unilateral and subjective intent is inadmissible to explain the meaning of what was written, evidence of the parties' situation and the circumstances under which the instrument was executed is admissible to properly construe the writing. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App 1, 9, 937 P.2d 1143 (1997); *see also Lynott v. Nat'l Union Fire Ins. Co*., 123 Wn.2d 678, 683-84, 871 P.2d 146 (1994). Although both parties maintain there are no disputed factual issues, the record shows otherwise.

Black's declaration suggests that the parties intended to preclude a buyout. In it, Black explains the circumstances under which the corporation was formed. He describes the genesis of the new firm, key problems the partners had with their old firm—including that numerous and significant buyouts left little funds for the remaining attorneys—and the parties' discussions in which they agreed that a founding principle of their new firm would be to preclude buyouts in order to maximize their incomes. He concludes that section 18 was intended to reflect that agreement. McCormick argues that Black's "self-serving" declaration of unilateral and subjective intent cannot be used to modify the terms of the contract, a position the trial court apparently accepted. Br of Resp't at 9; *see* CP at 314-16. This testimony, however, is more than a subjective interpretation of the contract's terms; Black's declaration, at least in part, describes the factual circumstances surrounding the contract's execution. To the extent that Black's declaration addresses factual circumstances and is not a subjective statement of intent, it raises a disputed issue of material fact as to what the parties intended with section 18. And although McCormick did not file a declaration in opposition to Black's, he argues that Black's interpretation of section 18 is inconsistent with the firm's contemplated stock redemption agreement in the articles and bylaws. We conclude that the language and setting of section 18 precludes summary judgment for either party.

Accordingly, the trial court erred in granting McCormick's motion for summary judgment, declaring that the employment agreement has no current force with regard to McCormick's shareholder interest. We also hold that the trial court erred in granting McCormick's cross motion for summary judgment, declaring that the Act, RCW 18.100.116(1) and (2), applies to

govern McCormick's shareholder rights. Because the trial court erred in its interpretation of the employment agreement's effect, its ruling on the application of the Act is premature.[8] Thus, in addition to reversing and remanding for trial on the issue of whether section 18 of the employment agreement defines and limits McCormick's shareholder interest, we vacate the trial court's ruling on the application of the Act.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.

[8] If the employment agreement is found to preclude a buyout, it would likely govern the outcome of this litigation. In this event, it is unclear whether the Act would even apply, although the trial court could find it to be a "private agreement" under RCW 18.100.116(1). If the trial court finds that section 18 does not preclude a buyout, then RCW 18.100.116(2) potentially governs McCormick's shareholder rights under its default provisions as decided below. But these scenarios are hypothetical, and because these issues have not been fully developed in the trial court, nothing we have said here binds the trial court in considering these questions. As such, the applicability of the Act, if any, hinges on the trial outcome.